Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	**CC Docket No. 96-98**
Inter-Carrier Compensation for ISP-Bound Traffic	)	**CC Docket No. 99-68**

COMMENTS OF THE
ASSOCIATION OF COMMUNICATIONS ENTERPRISES

The Association of Communications Enterprises ("ASCENT"),[1] through undersigned counsel and pursuant to Section 1.429(f),[2] hereby offers the following comments on the multiple pending petitions for reconsideration and/or clarification of the *Order on Remand and Report and Order*, FCC 01-131, released in the captioned proceedings on April 27, 2001 ("*Remand Order*"). In the *Remand Order,* the Commission established an intercarrier compensation mechanism for traffic delivered to Internet service providers ("ISPs"), which traffic the Commission determined

[1] ASCENT is a national trade association comprised of more than 800 entities engaged in, or providing products and/or services in support of, the competitive provision of telecommunications and information services. ASCENT was created, and carries a continuing mandate, to foster and promote the competitive provision of telecommunications and information services, to support the competitive communications industry, and to protect and further the interests of entities engaged in the competitive provision of telecommunications and information services. ASCENT is the largest association of competitive carriers in the United States, numbering among its members not only the large majority of providers of domestic interexchange and international services, but the majority of competitive local exchange carriers, as well.

[2] 47 C.F.R. § 1.429(e).

to be "predominantly interstate access traffic subject to section 201 of the Act," and hence not covered by Section 251(b)(5).[3] Five parties – the Florida Public Service Commission ("FPSC"), Wireless World LLC ("Wireless World"), the Independent Alliance on Inter-Carrier Compensation ("IAIC"), the National Telephone Cooperative Association ("NTCA"), and a coalition of small incumbent LECs ("Choctaw, *et al.*") -- have sought reconsideration and/or clarification of elements of the *Remand Order*. ASCENT endorses the Wireless World petition, opposes the NTCA, IAIC and Choctaw, *et al.* petitions, and concurs with the FPSC that clarification of certain elements of the *Remand Order* would aid in the implementation of the Commission's new intercarrier compensation regime.

NTCA, IAIC, and Choctaw, *et al.* Petitions

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[3] Remand Order, FCC 01-131 at ¶ 1; 47 U.S.C. § 251(b)(5). ASCENT disagrees with the Commission's conclusion that ISP-bound traffic is exchange access traffic to which the provisions of Section 251(b)(5) do not extend. ASCENT has accordingly intervened in support of petitioners in the multiple pending appeals of this holding currently consolidated before the U.S. Court of Appeals for the District of Columbia Circuit in WorldCom, Inc. v. FCC, Case No. 01-1218.

NTCA, IAIC, and Choctaw, *et al.* (collectively, the "ILEC Petitioners"), all challenge, on a variety of procedural, legal and policy grounds, a key condition imposed by the *Remand Order* on the ability of an incumbent local exchange carrier ("LEC") to implement the caps adopted therein on intercarrier compensation rates for ISP-bound traffic – *i.e,* that all traffic subject to section 251(b)(5) must be exchanged at the same rate paid for termination of ISP-bound traffic. Procedurally, the ILEC Petitioners complain that the *Remand Order* denied them lawful notice of the potential extension of rate caps applicable to ISP-bound traffic to traffic subject to Section 251(b)(5).[4] As a legal matter, the ILEC Petitioners attack the *Remand Order* as impermissibly interfering with the oversight of the individual state commissions over interconnection agreements and the charges set forth therein, and wrongfully disrupting existing reciprocal compensation arrangements.[5] From a public policy perspective, the ILEC Petitioners challenge the *Remand Order* as adversely impacting their revenues, purportedly potentially denying them the ability to fully recover their costs.[6]

The ILEC Petitioners' procedural and legal challenges are all predicated on the erroneous view that the *Remand Order* effectively compels them to cap their intercarrier compensation rates for the exchange of traffic at the rate caps adopted by the Commission for traffic delivered to ISPs. The ILEC Petitioners' public policy arguments reflect an unabashed sense of entitlement to extract from competitive LECs amounts in excess of those they would pay the competitive LECs for performing essentially the same functions. Hence, none of the ILEC Petitioners' procedural, legal or public policy challenges warrant reconsideration of the cost recovery mechanism established by the Commission for the exchange of traffic delivered to ISPs.

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4 NTCA Comments at 5 - 8; IAIC Comments at 4 - 6; Choctaw, *et al.* at 2 - 4.

5 NTCA Comments at 5 - 8; IAIC Comments at 7 - 12; Choctaw, *et al.* at 4 - 8.

6 NTCA Comments at 6 - 8; IAIC Comments at 7 - 10; Choctaw, *et al.* at 6 - 8.

The ILEC Petitioners' claims that they were denied adequate notice are facially without merit. Following remand by the U.S. Court of Appeals for the District of Columbia Circuit of the Commission's Declaratory Ruling regarding intercarrier compensation for the delivery of telecommunications traffic to ISPs, the Commission advised that in addition to addressing "the issues identified by the court in its decision," it would be exploring "new or innovative inter-carrier compensation arrangements for ISP-bound traffic."[7] In the *Remand Order*, the Commission addressed the various issues remanded to it by the Court and adopted a new cost-recovery mechanism for ISP-bound traffic, thereby doing precisely that which it had advised the industry it would do. An integral part of the mechanism so adopted was the "mirroring rule" which enhanced the viability of the new compensation scheme by ensuring that one perceived imbalance was not simply replaced with another.

It is well established that to pass statutory muster "[n]otice need not contain every precise proposal which the agency may ultimately adopt as a rule."[8] "Rather notice is sufficient if the description of the 'subjects and issues involved' affords interested parties a reasonable opportunity to participate in the rulemaking."[9] Or couched somewhat differently, "a notice requirement is satisfied so long as the content of the agency's final rule is a 'logical outgrowth' of its rulemaking proposal, . . . [and] [t]he focus of the 'logical outgrowth test . . . 'is whether . . . [the

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[7] Public Notice, 15 FCC Rcd. 1311 (released June 23, 2001). *See also* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (Declaratory Ruling), 14 FCC Rcd. 3689, ¶ 33 (1999) (*subsequent history omitted).*

[8] Transpacific Freight Conference v. Federal Maritime Commission, 650 F.2d 1234, 1248 (D.C. Cir. 1980), *cert. denied* 451 U.S. 984 (1981).

[9] Id.

party], *ex ante*, should have anticipated that such a requirement might be imposed'."[10]

[10] Aeronautical Radio, Inc. v. Federal Communications Commission, 928 F.2d 428, 445 - 46 (D.C. Cir. 1991), *rehearing denied, appeal after remand* 983 F.2d 275 (D.C. Cir. 1993); Hercules, Inc. v. U.S. Environmental Protection Agency, 938 F.2d 276, 283 (D.C. Cir. 1991); Natural Resources Defense Council, Inc. v. Thomas, 838 F.2d 1224, 1242 (D.C. Cir. 1988), *cert. denied* 488 U.S. 8888 (1988).

Certainly, requiring incumbent LECs that avail themselves of the benefits of the rate caps imposed by the Commission on ISP-bound traffic to mirror those reduced rates for performing the same function is a "logical outgrowth" of the Commission's notice that it intended to explore new compensation arrangements for the delivery of traffic to ISPs. Indeed, it is illogical to anticipate that different compensation rates would be established for the same activity. That such a requirement should have been anticipated is confirmed by the debate regarding the appropriateness of "symmetrical reciprocal compensation rates" conducted in the comments submitted in response to the *Public Notice*.[11] The numerous parties that engaged in that debate cannot be said to have been denied "a reasonable opportunity to participate in the rulemaking" with respect to the condition ultimately imposed on incumbent LECs electing to cap compensation rates for ISP-bound traffic, and hence, neither can it be said that the ILEC Petitioners were so denied.

[11] Remand Order, FCC 01-131 at ¶¶ 90 - 93.

The lack of merit in the ILEC Petitioners' procedural challenge to the *Remand Order* is confirmed by the flexibility built into the new compensation arrangement by the Commission. Contrary to NTCA' and IAIC's assertions,[12] incumbent LECs are not obliged to exchange traffic subject to Section 251(b)(5) at the reduced compensation rates identified in the *Remand Order* for ISP-bound traffic.[13] The *status quo* is preserved for those incumbent LECs that elect not to apply these rate caps to non-ISP-bound traffic. In such a circumstance, both ISP-bound and non-ISP-bound traffic would be exchanged at "state-approved or state-arbitrated reciprocal compensation rates" just as they are now.[14] Only if an incumbent LEC desires to avail itself of the lower charges for exchange of ISP-bound traffic the *Remand Order* would produce, would it be required to apply the ISP-bound traffic rate caps to non-ISP-bound traffic. This "mirroring rule," hence, does not require incumbent LECs to reduce their existing intercarrier compensation rates; it merely "ensures that incumbent LECs will pay the same rate for ISP-bound traffic that they receive for section 251(b)(5) traffic."[15] Moreover, it is noteworthy that the Commission took yet a further step designed to enhance the flexibility of its "mirroring rule," in this instance by allowing incumbent LECs to make elections regarding the use of ISP-bound traffic rate caps on a state-by-state (and where appropriate, on a customer-by-customer) basis.[16]

ASCENT does not disagree with the ILEC Commenters that the Commission might

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[12] NTCA Comments at 2, 6 - 7; IAIC Comments at5.

[13] Remand Order, FCC 01-131 at ¶ 89.

[14] Id.

[15] Id.

[16] Id.

well have been on shaky procedural ground if it had simply imposed rate caps on traffic subject to section 251(b)(5) without notice of its intent to do so. It did not do so however. The Commission provided incumbent LECs with a choice between maintenance of the *status quo* or securing a reduction in the compensation paid to terminate ISP-bound traffic on the condition that all traffic be exchanged at the same rate. While the ILEC Commenters declare that this is no choice at all, it is in reality a fair choice and certainly choice enough to defeat their "lack of notice" arguments.

The choice, moreover, reflects rational decisionmaking on the part of the Commission. As the Commission recognized, there are no "inherent differences between the costs on any one network of delivering a voice call to a local end-user and a data call to an ISP."[17] As the Commission explained, "[a]ssuming the two calls have otherwise identical characteristics (e.g., duration and time of day), a LEC generally will incur the same costs when delivering a call to a local end-user as it does delivering a call to an ISP."[18] Thus, having concluded that "[t]o the extent that . . . per minute reciprocal compensation rate levels and rate structures produce inefficient results . . . the problems lie with this recovery mechanism in general and are not limited to any particular type of traffic," the Commission reasoned that "[i]t would be unwise as a policy matter, and patently unfair, to allow incumbent LECs to benefit from reduced intercarrier compensation rates for ISP-bound traffic, with respect to which they are net payors, while permitting them to exchange traffic at state reciprocal compensation rates, which are higher than the caps . . . adopt[ed] here, when the traffic imbalance is reversed."[19]

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17 Id. at ¶ 90.

18 Id.

19 Id. at ¶ 89.

Contrary to the ILEC Petitioners' contentions, the Commission, in adopting this new intercarrier compensation mechanism, exercised great care not to interfere unnecessarily with the authority of state commissions or to unnecessarily disrupt existing reciprocal compensation arrangements. As noted above, under the voluntarily regime developed by the Commission, existing reciprocal compensation arrangements will be altered only if the incumbent LEC elects to avail itself of the benefits of the caps imposed on the charges levied for termination of ISP-bound traffic. "State-approved or state-arbitrated reciprocal compensation rates" would continue to apply unless the incumbent LEC elects to cap intercarrier compensation for ISP-bound traffic. Moreover, even if an incumbent LEC were to make such an election, the Commission has stressed that the caps on intercarrier compensation would have no effect in states in which incumbent LECs have already been ordered to exchange ISP-bound traffic either at below-cap rates or on a bill-and-keep basis.[20] That all having been said, the Commission's authority to mandate national pricing rules under Section 251, including Section 251(b)(5), has been long recognized by the Commission,[21] and upheld by the Courts.[22]

With respect to the ILEC Commenters' claim that implementation of the "mirroring rule" would deny them the ability to fully recover their costs of traffic termination, incumbents cannot have it both ways. If their cost recovery would be inadequate under the *Remand Order's* rate

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[20] Id. at ¶ 80. As the FPSC notes, "incumbent carriers must either exchange all Section 251(b)(5) traffic at the FCC's capped rate, institute bill and keep for all Section 251(b)(5) traffic (in those state in which bill and keep has been ordered), including ISP-bound traffic, or must exchange ISP-bound traffic at 'the state-approved or state-negotiated reciprocal compensation rates reflected in their contracts'." FPSC Comments at 1.

[21] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499, ¶¶ 111 - 120 (1996) (*subsequent history omitted).*

[22] AT&T Corp., et al. v. Iowa Utilities Board, 525 U.S. 366 (1999). (*subsequent history*

caps, so too would be the cost recovery of competitive LECs terminating ISP-bound traffic. Yet the ILEC Commenters endorse the rate caps as applied to ISP-bound traffic terminated by competitive LECs.[23]

Wireless World Petition

omitted).

[23] Choctaw, et al. Comments at 1 - 2 ("The Petitioners support the Commission's efforts to eliminate the gaming, profiteering, regulatory arbitrage and uneconomical results produced by the application of the Section 251(b)(5) reciprocal compensation provisions developed for traditional voice traffic to high-volume, one directional traffic bound via Internet Service Providers ("ISP") to Internet destinations around the world.").

Wireless World seeks two elements of relief from the Commission. First, Wireless World asks the Commission to include among those competitive providers that will be compensated for terminating ISP-bound traffic at the capped rates adopted in the *Remand Order* carriers that had requested interconnection negotiations on or before the date on which the *Remand Order* was released.[24] Second, Wireless World seeks clarification that when a competitive provider enters into a new market, it will only be required to terminate ISP-bound traffic on a bill-and-keep basis if the incumbent LEC exchanges all traffic on that basis.[25]

With respect to the latter clarification request, ASCENT believes that the *Remand Order* is clear on this point. ASCENT reads the *Remand Order* to limit the compensation paid for terminating ISP-bound traffic only in those circumstances in which the incumbent LEC exchanges all traffic at the same rate, and that this limitation applies to rates paid, as well as to rates not paid pursuant to bill-and-keep arrangements. To paraphrase the Commission, if an incumbent LEC desires "to exchange ISP-bound traffic on a bill and keep basis. . . it must offer to exchange all section 251(b)(5) traffic on a bill and keep basis."[26]

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[24] Wireless World Comments at 3-5. To the extent this relief is granted, Wireless World further urges the Commission to "suspend the 'growth cap' provisions of its rule for a period of at least one year to enable these new market entrants to have a reasonable period of time to ramp-up their operations."

[25] Id. at 5 - 6.

[26] Remand Order, FCC 01-131 at ¶ 89.

As to Wireless World's first point, ASCENT acknowledges that the Commission "confined" its transitional cost-recovery mechanism to instances in which carriers were actually exchanging traffic pursuant to interconnection agreements prior to adoption of the *Remand Order*. ASCENT submits, however, that the logic underlying the Commission's interim compensation regime supports grant of the incremental extension of this regime sought by Wireless World. As described by the Commission, the interim compensation mechanism adopted in the *Remand Order* was designed to account for "the legitimate business expectations of carriers," avoiding "a market-disruptive 'flash cut' to a pure bill and keep regime."[27] Carriers which had requested interconnection negotiations on or before the date on which the *Remand Order* was released have likely factored current reciprocal compensation mechanisms into their business plans, "act[ing] in reliance on reciprocal compensation revenues" in formulating and implementing their market entry strategies.[28] Accordingly, the need for a "transition during which to make adjustments to their prior business plans" legitimately extends as well to carriers which had requested interconnection agreements on or before April 27, 2001.[29]

FPSC Petition

The FPSC has identified a number of ambiguities in the *Remand Order*. ASCENT concurs with the FPSC that clarification is required with respect to each of the identified matters and urges the Commission to do so.

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27 Id. at ¶ 77.

28 Id. at ¶ 81.

29 Id.

Conclusion

By reason of the foregoing, the Association of Communications Enterprises urges the Commission to deny the reconsideration petitions filed by NTCA, IAIC and Choctaw, *et al.*, and to grant the petitions for reconsideration and/or clarification filed by Wireless World and the FPSC.

Respectfully submitted,

ASSOCIATION OF COMMUNICATIONS ENTERPRISES

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CERTIFICATE OF SERVICE

I, Charles C. Hunter, do hereby certify that a true and correct copy of the foregoing document was served by First Class Mail, postage prepaid, on the individuals list below, on this 23rd day of July, 2001:

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